Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1998

ROCKY MOUNTAIN RADAR, INC.,

Petitioner,

-v-

FEDERAL COMMUNICATIONS COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.. WHETHER THE INTERPRETATION OF THE PHRASE "...GENERATES AND EMITS RADIO FREQUENCY ENERGY..." TO INCLUDE A DEVICE THAT ONLY REFLECTS RADIO FREQUENCY ENERGY GENERATED AT OTHER SOURCES AND WHICH IS INCAPABLE OF GENERATING ANY ENERGY ON ITS OWN RENDERS 47 C.F.R. §15.3(6) SO VAGUE AND UNCERTAIN THAT IT NO LONGER APPRISES THOSE TO WHOM IT IS DIRECTED OF THE DUTIES IMPOSED ON THEM IN VIOLATION OF THE DUE PROCESS REQUIREMENTS OF THE UNITED STATES CONSTITUTION.

II. WHETHER THE FCC'S INTERPRETATION CHANGING THE SCOPE OF THE REGULATION TO INCLUDE BEHAVIOR NOT PREVIOUSLY WITHIN ITS PURVIEW WITHOUT ENTERING INTO A STATUTORY RULE MAKING PROCEEDING VIOLATES THE DUE PROCESS RIGHTS OF THE PETITIONER AND THE PUBLIC IN GENERAL.

III. WHETHER THE COURT ERRED IN MISQUOTING ITS OWN AUTHORITIES AND GIVING DEFERENCE TO AN AGENCY'S INTERPRETATION OF ITS OWN REGULATIONS THAT IS PLAINLY ERRONEOUS AND INCONSISTENT WITH THE PLAIN LANGUAGE OF THE REGULATION.

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The opinion of the United States Court of Appeals for the Tenth Circuit is set forth in the Appendix, at page 1. The December 10, 1997 Order of the Federal Communications Commission affirmed by the Court of Appeals is set forth in the Appendix at page 15a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

Jurisdiction in this Court is authorized by 47 U.S.C. §402(j), 28 U.S.C. §2350(a) and 28 U.S.C. §1254 by writ of certiorari granted upon the petition of any party after the rendition of judgment in the courts of appeals. 28 U.S.C. §1254(1). The United States Court of Appeals for the Tenth Circuit issued its opinion on October 19, 1998. This Petition was timely filed within 90 days of the judgment.

CONSTITUTIONAL, STATUTORY, ORDINANCE AND REGULATORY PROVISIONS

1. 47 C.F.R. §15.3(o) provides:

   §15.3(o) Intentional radiator

   A device that intentionally generates and emits radio frequency energy by radiation or induction.

2. 47 C.F.R. §15.3(u) provides:

   §15.3(u) Radio frequency (RF) energy

Electromagnetic energy at any frequency in the radio spectrum between 9 kHz and 3,000,000 MHz.

3. 47 C.F.R. §2.801 provides:

§2.801 Radio frequency device defined

As used in this part, a radio frequency device is any device which in its operation is capable of emitting radio frequency energy by radiation, conduction, or other means. Radiofrequency devices include, but are not limited to:

(a) The various types of radio communication transmitting devices described throughout this chapter.

(b) The incidental, unintentional and intentional radiators defined in part 15 of this chapter.

(c) The industrial, scientific, and medical equipment described in part 18 of this chapter.

(d) Any part of component thereof which in use emits radiofrequency energy by radiation, conduction, or other means.

4. 47 C.F.R. §2.803 provides:

§2.803 Equipment requiring Commission approval

In the case of a radio frequency device, which, in accordance with the rules in this chapter must be type approved, type accepted, certificated or notified prior to use, no person shall sell or lease, or offer for sale or lease (including advertising for sale or lease) or import, ship or distribute for the purpose of selling or

leasing or offering for sale or lease, any such radio frequency device, unless, prior thereto, such devices shall have been type approved, type accepted, certificated or notified as the case may be: *Provided, however,* That the advertising or display of a device, which has not been granted type approval, type acceptance, certification or notification, will not be deemed to be an offer for sale if such advertising contains, and the display is accompanied by, conspicuous notice worded as follows:

This device has not been approved by the Federal Communications Commission. This device is not, and may not be, offered for sale or lease, or sold or leased until the approval of the FCC has been obtained.

This provision does not apply to radio frequency devices that could not be granted an equipment authorization or be legally operated under our current rules. Such devices shall not be advertised or displayed or offered for sale or lease or sold or leased. *Provided further,* That any non-approved device displayed under the terms of the above provision may not be activated or operated.

5. 47 U.S.C. §402(a) provides:

§402(a) Judicial review of Commission's orders and decisions

(a) **Procedure.** Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under

the subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of
Title 28.

6. 47 U.S.C. §402(j) provides:

§402(j) Judicial review of Commission's orders and decisions; Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

7. 28 U.S.C. §1254 provides:

§1254 Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give

binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

8. 5 U.S.C. §551(4) provides:

§551(4) Definitions; rule

"rule" means the whole or a party of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

9. 5 U.S.C. §553(b) – (e) provides:

§553(b) Rule making

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply –

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except –

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

10. 28 U.S.C. §2350(a) provides:

§2350(a) Review in Supreme Court on certiorari or certification

(a) An order granting or denying an interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a write of certiorari as provided by section 1254(l) of this title. Application for the write shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

* * * *

STATEMENT OF THE CASE

I. Basis of Jurisdiction in the Court of Appeals.

This case began as an appeal of a final decision of the FCC ruling that Rocky Mountain Radar's (Petitioner" or "RMR") "Spirit II" product is an "intentional radiator" of electromagnetic energy subject to FCC regulation and licensing requirements. Appendix 15a.

Petitioner's president, Michael B. Churchman, presented evidence to the FCC staff on August 14, 1997. Churchman presented test reports from FCC-approved laboratories stating that the Spirit II does not, and cannot, meet the definition of an "intentional radiator" set forth in the FCC's regulations. *See*, 47 C.F.R. §15.3(o). The report of HVB Consulting Group concluded not only that the Spirit II did not generate RF Energy but that it was incapable of doing so based upon its component parts. The FCC refused to change its original findings.

On August 18, 1997, Petitioner filed an Application for Review by the entire Commission. The Memorandum Opinion and Order of the Commission released December 10, 1997, upheld jurisdiction and restated the determination that the Spirit II is an "intentional radiator" because it reflects RF Energy; not because it generates RF Energy. Appendix at 19a.

On December 23, 1997 Petitioner filed a Petition for Review of the FCC's actions with the Tenth Circuit Court of Appeals. The FCC challenged the Circuit Court's jurisdiction over the matter. The Circuit Court upheld jurisdiction pursuant to 47 U.S.C. §402(a).

II. Statement of facts relevant to the issues presented for review.

The Spirit II radar scrambler does not, and cannot, generate and emit "radio frequency energy" defined by the FCC as electromagnetic energy between 9KHz and 3,000,000 MHz. *See*, 47 C.F.R. §15.3(u). This fact was not controverted by any evidence in the record.

The FCC did not deny the Spirit II's inability to create or produce its own energy. Rather, it asserted that the ability to "reflect" energy received from another source is the "generation and emission" of electromagnetic energy required for regulation. Appendix 19a. Therefore, the FCC concluded that the Spirit II is an "intentional radiator" as defined by 47 C.F.R. §15.3(o) and is subject to the FCC's equipment authorization rules. Appendix 19a-20a.

The Circuit Court recognized the need to give deference to the FCC's interpretation of its own regulations. The Court then determined that,

> The FCC's decision to give "generate" a more expansive treatment than that advocated by RMR is consistent with the ordinary meaning of the term as in "create," "produce," or "propagate." Webster's Third New International Dictionary at 945; *see also* id. at 1817 (defining "propagate" as "to cause to continue").

Appendix at 11. The Circuit Court Affirmed the Order of the FCC based upon this determination.

ARGUMENT

I. THE INTERPRETATION OF THE PHRASE "...GENERATES AND EMITS RADIO FREQUENCY ENERGY ..." FOUND IN 47 C.F.R. §15.3(o) TO INCLUDE A DEVICE THAT ONLY REFLECTS ENERGY GENERATED AT OTHER SOURCES AND WHICH IS INCAPABLE OF GENERATING ANY ENERGY ON ITS OWN RENDERS 47 C.F.R. §15.3 SO VAGUE AND UNCERTAIN THAT IT NO LONGER APPRISES THOSE TO WHOM IT IS DIRECTED OF THE DUTIES IMPOSED ON THEM IN VIOLATION OF THE DUE PROCESS REQUIREMENTS OF THE UNITED STATES CONSTITUTION.

Due process requires that statutes and regulations promulgated pursuant to statutory authority be sufficiently clear to enable persons whom they affect to be reasonably certain of the duties they impose. *Franklin v. First Money, Inc.* , 427 F. Supp. 66, Affirmed 599 F.2d 615 (D.C.E.D.La. 1976). The fundamental purpose of this requirement is to prevent capricious and unforeseeable enforcement of the law, and to require its application in a fair and reasonable manner. *Colton v. Commonwealth of Kentucky,* 407 U.S. 104, 92 S.Ct. 1953, L.Ed.2d 584 (1972).

Incomplete, vague, and indefinite administrative regulations violate due process. *Brennan v. Occupational Safety and Health Review Commission*, 505 F.2d 869 (10th Cir. 1974). The test of whether a particular administrative regulation is void for vagueness is whether the regulation delineates

its reach in words of common understanding. *Franklin*, 427 F.Supp.66; *Brennan*, 505 F.2d 869. This due process principle applies with equal force to new agency interpretations of existing regulations which cause application of the regulations to unsuspecting parties. *Cheshire Hospital v. new Hampshire-Vermont Hospitalization Service, Inc.*, 689 F.2d 1112 (1st Cir. 1982). In the event of a challenge to an agency interpretation of its own regulation, the court has a duty to determine whether the interpretation is plainly erroneous, or inconsistent with the plain language of the regulation in question. *Id.* Though agency interpretations are given great deference by the courts, the deference given should not equate to a "rubber-stamp," and should not be used to avoid the courts' duty. *Id.*

The FCC concluded that the Spirit II's ability to reflect Energy that is generated at another source, is the "generation" of Energy required to place the Spirit II within the purview of its regulations. The FCC stated "[t]he Fact that the original source of the radio frequency energy is external to the device does not place the Spirit II beyond the Commission's jurisdiction." Appendix at 19a. The Circuit Court deferred to the FCC's conclusion that the definition is consistent with the ordinary meaning of the word "generate." Appendix at 11.

The Court relied on the definition of "generate" in *Webster's Third New International Dictionary*, at page 945, which provides: "1: to cause to be"; and "2: to originate"; "3: to define"; "4: to form" and "5: to be the cause of." The word "propagate" is listed as a synonym when the intended meaning is to produce offspring." The Court then utilized a portion of the definition of the word "propagate" to support its conclusion. Appendix at 15.

The deleted portion of the definition completely changes the meaning that the Court purports to rely upon. The dictionary definition does not say "to cause to continue" as asserted by the Court. Rather, it states: "1: to cause to continue or increase by natural reproduction <~a breed of horses><a plant unable to ~ itself in a region><~a tree vegetatively>." The Court's determination that the "reflection of energy" can be reasonably included in the ordinary meaning of the term "generate energy" is based upon erroneous definition of the terms and renders the regulation vague and indefinite.

Every metallic or reflective object will reflect a RF Energy signal. Every moving object will modulate a RF Energy signal. Neither of these events is the equivalent of generating radio frequency energy. The FCC's interpretation of its regulation, if upheld, would outlaw all moving automobiles (indeed, any moving object) on the grounds that it modifies and reflects a RF radio signal when irradiated with radar. Obviously, the FCC's regulations would not be useful in guiding the behavior of electronics manufacturers if they lead to such an unreasonable result.

Although we would not anticipate that the FCC would exercise this authority in an unreasonable or silly manner; that is not the issue. The interpretation creates a situation in which men of common intelligence must guess at the meaning of the word "generate" because the interpretation adopted by the FCC includes every moving object. No one knows where the line is now drawn between generators of energy and non-generators. In fact, in its ruling of December 10, 1997, the FCC demonstrates that its reinterpretation of the regulation cannot be consistently applied. In paragraph 7 of that ruling the Spirit II is said to be an Intentional Radiator

that generates and emits RF energy; but, in paragraph 8 of the same ruling the FCC states that the device "does not generate pulses greater than 9,000 pulses per second" which is the FCC's definition of RF energy produced by an intentional radiator. Appendix at 19a-20a. As a result of the new interpretation, the FCC has been able to conclude that the Spirit II device IS a RF generator AND is NOT a RF generator in the same breath.

> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be the master–that's all."
>
> Lewis Carroll, Through the Looking Glass

The interpretation renders the regulation unconstitutionally vague and uncertain in its application. It no longer provides guidance to those who are to be governed by it. Accordingly, the ruling of the Circuit Court must be reconsidered, or, the regulation should be declared unenforceable as it is in violation of the due process requirements of the United States Constitution, Constitutional Amendment 5.

II. THE COURT'S AFFIRMATION OF THE FCC'S REINTERPRETATION CHANGES THE SCOPE OF THE REGULATION TO INCLUDE BEHAVIOR NOT PREVIOUSLY WITHIN ITS PURVIEW WITHOUT ENTERING INTO A STATUTORY RULEMAKING PROCEEDING IN VIOLATION OF THE DUE PROCESS RIGHTS OF PETITIONER AND ALL CITIZENS.

It is clear from the plain language of the FCC's enabling legislation and its own regulations that its legal influence extends only to devices that generate electromagnetic energy in the RF spectrum. *See*, 47 C.F.R. §15.3(o). All parties concede that the Spirit II device does not create or produce any electromagnetic energy but operates by reflecting the energy from other sources. As discussed in Section I. of this petition, the plain and logical meaning of the term "Generate" does not, without significant contortion, include the reflection of energy. The FCC demonstrated its knowledge of this fact when in 1996 it issued a notice that "TRANSMITTERS," i.e. generators of RF Energy, that scramble police radar are prohibited. Nevertheless, the terms of the regulation have been reinterpreted to include the reflection of energy. The reinterpretation sweeps many previously unregulated products within the scope of the FCC's jurisdiction without warning, without notice and without any opportunity to comment.

Though administrative agencies, including the FCC, possess a good degree of discretion in determining whether to announce policy via rules or orders, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974), does set forth criteria limiting the ability of administrative

agencies to use an order to accomplish what is appropriately undertaken by formal rulemaking proceedings. These criteria are: whether the diversity and complexity of the problem justifies proceeding on a case-by-case basis, whether the complainant placed any great reliance on the earlier and inconsistent agency actions, whether the policy change involves new liability suffered by the complainant because of good faith reliance on the previous policy and whether the complainant faces fines and damages because of its reliance on the old policy.

Interpreting a simple word in an existing regulation in an outlandish manner creates a significant impact on entities not previously subject to the regulation. Here, it will cause RMR, which relied in good faith upon the plain language of the FCC's Rules, to suffer new liability and face fines and damages. The FCC's action in this matter is at its heart a rulemaking but the FCC is hiding behind the more FCC-friendly adjudication process. The Administrative Procedures Act defines "rule" in 5 U.S.C., §551(4) as, ". . . an agency statement of general or particular applicability and future effect designated to implement, interpret or prescribe law or policy. . . ."

The FCC should have followed the notice and comment procedures set forth in the Administrative Procedures Act at 5 U.S.C., §553, as the minimum required for due process. The rule making provisions of §553 may not be avoided by the process of making rules in the course of adjudicatory proceedings. *NLRB v. Wyman-Gordon Co.*, U.S. Mass. 1969, 89 S.Ct. 1426, 394 U.S. 759, 22 L.Ed.2d 709 (1969).

Here, the Court upheld the FCC's legislative decision to include previously unregulated products that reflect energy

within the scope of regulations governing products that generate energy. This legislative act was performed in a judicial/fact finding proceeding in violation of the requirements of the Administrative Procedures Act and the requirement of minimal due process for legislative actions. As such, the actions of the FCC and the Circuit Court must be declared invalid.

III. THE COURT ERRED IN GIVING DEFERENCE TO THE FCC'S INTERPRETATION OF ITS OWN REGULATION, WHICH WAS PLAINLY ERRONEOUS AND INCONSISTENT WITH ITS PLAIN LANGUAGE.

Deference should be given to an agency's interpretation of its own regulation, but not if the interpretation is plainly erroneous or inconsistent with the clear meaning of the terms employed or is unreasonable. *See*, *Downtown Medical Center v. Bowen*, 944 F.2d 756 (10th Cir. 1991); *Wilder v. Prokop*, 846 F.2d 613 (10th Cir. 1988).

Neither the enabling statutes, nor the regulations contain a definition of the term "generate." As in any case, a regulation, rule or statute should be interpreted based upon the **ordinary** meaning of the terms employed. *See*, *In Re M & L Business Mach. Co., Inc.*, 75 F.3d 586 (10th Cir. 1996); *Ward v. Allstate Ins. Co.*, 45 F.3d 353 (10th Cir. 1994); *Spano v. Western Fruit Growers*, 83 F.2d 150 (C.C.A. Colo. 1936). This rule of interpretation insures that those governed by a regulation will be apprised of its meaning consistent with the requirements of due process. In plain English, the terms "generate" and "emit" cannot be construed in the manner attempted by the FCC and affirmed by the Circuit Court.

In *Winterfield v. Hardin County Rural Electric,* 226 Iowa 806, 285 N.W. 219 (1989) the Court noted that "'Generate' means to beget, produce, to cause to be, to produce an electric current." Dictionary definitions support the notion that "generate" means to create or bring into existence.

1) Webster's 3rd Annual New Dictionary, 1993

> To beget, create, to cause to be, to bring into existence, to originate by physical or chemical process, to produce, to form with theoretical accuracy, to come into existence,; originate, arise.

2) Webster's New Reference Library, 1984: Funk and Wagnall's New Standard Dictionary of the English Language:

> To produce or cause to be; be the cause of; to bring into being; to originate, create.

Similar definitions are found in the following sources:

The American Heritage Dictionary, Third Edition, 1985;

The Reader's Digest Great Encyclopedic Dictionary, 2nd Edition, 1966;

Random House Unabridged Dictionary, 2nd Edition;

The Morrow Book of New Words, N.H. and S.K. Mager, 1982;

The Barnhart Dictionary of New English Since 1963;

The Chambers Dictionary, New Edition, 1993;

and many others.

The Circuit Court notes these common definitions in its ruling. Appendix at 11. However, even though everyone seems to agree that the Spirit II operates by reflection of energy, there is no effort made to show how any of these terms could encompass the term reflect. Most significantly, the Circuit Court reaches beyond the common words used to define "generate." The Court lends credence to its conclusion that "generate" can encompass reflection by noting that "propagate" is defined in Webster's Third New International Dictionary as 'to cause to continue." Incredibly, the Court does not complete the definition contained in the dictionary, which in its entirety states: "to cause to continue or increase by natural reproduction" as in "propagate a breed of horses." Petitioner has been unable to successfully breed Spirit II's.

The FCC's statement that "'[t]he fact that the original source of the radio frequency energy is external to the device does not' transform it into one that does not 'generate' radio energy" (Appendix at 19a.) is absurd in light of these common definitions. As clearly demonstrated in the definitions of the plain language of §15.3(o), ***the device that originates the RF energy generates the RF energy***.

The FCC's new interpretation of the term "generate" is not reasonable. The FCC argues that the Spirit II modifies or modulates the signal it receives and reflects it back as a modified signal. RMR admits that the Spirit II operates in this manner but, so does every moving object. Nowhere in the

English language is changing, altering or modulating a signal analogous to creating or generating radio frequency energy.

The deference given by the Court to the FCC's interpretation of its regulation in this instance was misplaced. The common language of the regulation cannot support the interpretation and this matter must be returned to the Circuit Court for reconsideration of the common language of the provisions of the regulation.

CONCLUSION

The Court should grant *certiorari* to review this important matter. The consistent and sensible interpretation of agency regulations is necessary to advise manufacturers and others of the rules by which their behavior is to be governed thereby assuring due process. Without judicial oversight the agencies may attempt, as here, to expand the definitions in common use in their regulations beyond the bounds of common sense in order to suppress behavior the agency does not like without following the procedures required by the Administrative Procedures Act. The FCC cannot be allowed to interpret its own regulations in a manner that is so inconsistent with the words used that it chills economic activity by creating uncertainty. Furthermore, the FCC cannot be allowed to expand the common definitions of words to the point that they become meaningless. If the FCC is concerned about a certain product or activity, congress has granted it procedural means to change its regulations to encompass activity not already encompassed by the words of its regulations. The FCC should be required to utilize those procedures to accomplish its ends after hearing public comment on the wording and working of its regulation.

In short, the Circuit Court has sanctioned actions of the FCC that so depart from the accepted and usual course of adjudicative proceedings as to call for an exercise of this Court's supervisory power.

Respectfully submitted,

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(any footnotes, trail opinion)

No. 97-9579

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROCKY MOUNTAIN RADAR, INC., Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION, Respondent.

October 19, 1998, Filed

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JUDGES: Before BRORBY, McKAY, and BRISCOE, Circuit Judges.

OPINIONBY: MCKAY

OPINION:

McKAY, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Petitioner Rocky Mountain Radar, Inc. (RMR) appeals the determination of the Federal Communications Commission (FCC) that the marketing and sale of RMR's product, a radar jammer, is prohibited by FCC rules interpreting the Communications Act of 1934, as amended. We determine that we have jurisdiction over this appeal, and affirm the FCC order.

I. SUMMARY OF THE FACTS

RMR manufactures and distributes the Spirit II radar jammer, a device advertised as making the user's automobile "electronically invisible" to "all radar bands used by police." Appellant's App. at 144. In an advertisement, consumers were advised that the Spirit II "receives a radar signal," then "blends the signal with white noise," and "confuses the computer inside the radar gun." Id. n1

The FCC issued a public notice stating that the intentional use of jammers constitutes "malicious interference" with radar units used by FCC-licensed police and public safety agencies to measure vehicle speeds. Appellant's App. at 96-97 (informing the public that the FCC regulates radar jammers, which are designed to interfere with radar, but not radar detectors, which "are radio receivers tuned to receive radar signals and are used by motorists to provide a warning of any radar activity in the vicinity"). The agency warned that

"anyone using a jammer risks such penalties as losing an FCC license[], paying a fine, or facing criminal prosecution " Id.

On February 13, 1997, the Compliance and Information Bureau of the FCC issued an official citation to RMR prohibiting the marketing, manufacturing, or importing of the Spirit II. Id. at 13-14. RMR complied with the directive, but also contested the validity of the bureau's findings. It claimed, among other things, that the Spirit II is not covered by FCC rules regulating radiators of radio frequency energy because the device merely reflects a police radar signal and, by itself, cannot produce radio frequency energy. n2 See id. at 16, 21. In support of its theory, RMR provided test reports from independent laboratories. See id. at 40 (report of Diversified T.E.S.T. Technologies, Inc. opining that the Spirit II itself emits no radio frequency energy, and that without the use of a radar gun, the laboratory could not determine whether the device reflects RF energy); id. at 57-58 (report of HVB Consulting, Inc., stating that the Spirit II has no parts that "generate" radio frequency energy, but has the capability to reflect back "RF radiation"); id. at 105 (report of Ronald R. DeLyser, Ph.D., stating that the device mixes the radar signal "with either white noise or an FM chirp signal," then transmits back a "composite signal").

The Compliance and Information Bureau and the FCC Office of Engineering Technology reviewed the RMR submissions and rejected its arguments. In terms of FCC rules, the agency determined that the Spirit II is an "intentional radiator" that generates and emits radio frequency energy, as defined in 47 C.F.R. § 15.3(o). n3 Accordingly, the product cannot be marketed without FCC certification, because it is designed to "receive, modulate and emit a modulated signal." Appellant's App. at 36-37; see also 47 C.F.R. § 15.201(b). n4 The FCC,

however, could not certify the device, in that its intended purpose is interference with police communications, a violation of 47 C.F.R. § 15.5(b). n5

RMR applied for full Commission review of this determination, see 47 C.F.R. § 1.115, again contending that the Spirit II may not be prohibited under FCC rules because it is not an "intentional radiator" that "generates" radio frequency energy. Appellant's App. at 28-31. In an order on review dated December 10, 1997, the Commission recognized that the Spirit II is "designed to function only when it is illuminated by a police radar signal," but reasoned that it uses "the radar signal as a source of RF [(radio frequency)] energy, modulates the signal electronically to generate a different RF signal, and emits that RF signal to cause interference to police radars." Appellant's App. at 100. Thus, the Commission concluded, "the fact that the original source of the radio frequency energy is external to the device does not place [it] beyond the Commission's jurisdiction." Id.

The Commission also observed that, "irrespective of the definitional issues addressed above, Section 15.5 of the Commission's Rules, 47 C.F.R. § 15.5, expressly states that operation of an intentional, unintentional, or incidental radiator is subject to the condition that it may not cause harmful interference," and that the Spirit II "interferes with police radars which are devices properly authorized by the Commission." Appellant's App. at 101.

For both the above reasons, the FCC denied RMR's application for review. See id. at 102. In addition, its chairman issued a press statement announcing that the RMR decision "sends a message to all manufacturers that the FCC will strictly enforce its rules to prevent harmful interference

to police radar." Id. at 104. RMR filed a timely petition for review of the FCC determination.

II. JURISDICTION

Initially, we must address the FCC's claim that, at this stage in the proceedings, we lack jurisdiction to review its order. According to the FCC, judicial review is unavailable until and unless RMR continues to market the Spirit II, and the FCC imposes a penalty after completing the administrative process.

The general rule is that an agency action is reviewable. See Abbott Labs. v. Gardner, 387 U.S. 136, 140, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967). There are, however, exceptions to this rule. Judicial review is unavailable when (1) review is precluded by the agency's organic statute, see Block v. Community Nutrition Inst., 467 U.S. 340, 345, 81 L. Ed. 2d 270, 104 S. Ct. 2450 (1984); or (2) the matter is not ripe for court consideration, see Abbott Labs., 387 U.S. at 148-49. Contrary to the FCC's contentions, neither exception applies to this appeal.

A. STATUTORY PRECLUSION

The Supreme Court has "often noted" that courts should "restrict access to judicial review" only upon "'a showing of clear and convincing evidence of a contrary legislative intent.'" Lindahl v. Office of Personnel Management, 470 U.S. 768, 778, 84 L. Ed. 2d 674, 105 S. Ct. 1620 (1985) (quoting Abbott Labs., 387 U.S. at 141). The reviewing court examines the statute as a whole, together with its legislative history, in order to determine whether judicial review of a particular agency action would frustrate the statutory scheme

devised by Congress. Lindahl, 470 U.S. at 779 (citing Block, 467 U.S. at 345).

The statutory scheme for the FCC generally vests the courts of appeals with jurisdiction over appeals from final orders. See 47 U.S.C. § 402(a). n6 The district courts, however, have "a sliver of the jurisdictional pie" for enforcement of FCC orders imposing a monetary forfeiture penalty. Action for Childrens [*9] Television v. FCC, 827 F. Supp. 4, 10 (D.D.C. 1993), aff'd, 313 U.S. App. D.C. 261, 59 F.3d 1249 (D.C. Cir. 1995); see also 47 U.S.C. § 503(b) (providing for forfeiture procedures); § 503(b)(3)(B) (establishing district court as forum for government collection actions); § 504 (same). In the "maze of jurisdictional rules governing the review of FCC matters," Action for Children's Television, 827 F. Supp. at 10, we discern no Congressional design to bar our consideration of RMR's appeal. n7

The FCC has no explicit legislative or judicial authority for its argument that the establishment of a multi-step enforcement mechanism for FCC enforcement actions, standing alone, demonstrates an intent to forestall review unless and until the forfeiture process is completed. The legislative history cited by the FCC sheds no light on the issue. In 1978, Congress amended the Communications Act "to unify, simplify, and enlarge the scope of the forfeiture provisions," but made no attempt to limit judicial review. S. Rep. No. 95-580, at 1 (1978), reprinted in 1978 U.S.C.C.A.N. 109. It simply added an alternative approach, giving the FCC the option of holding an adjudicatory hearing in "the exceptional forfeiture case, where urgency, precedent value, or convenience of the Commission warrants a proceeding exclusively under the Commission's control until a final judgment on appeal is obtained." Id. at 4, 1978 U.S.C.C.A.N.

at 112. We fail to see how this background information demonstrates a Congressional intent to bar our review under the circumstances existing in this case.

Furthermore, the case law on appellate review of FCC determinations contradicts the agency's argument. For instance, in Straus Communications, Inc. v. FCC, 174 U.S. App. D.C. 149, 530 F.2d 1001 (D.C. Cir. 1976), the court found jurisdiction to review an FCC letter ruling which held that a broadcast licensee had violated a rule but, at the same time, rescinded the monetary sanction based on the violation. The court determined that review was appropriate, in spite of the lack of a forfeiture, because the existence of the letter could result in harsher treatment for further violations by the licensee. See 530 F.2d at 1005-07. See also Illinois Citizens Comm. for Broad. v. FCC, 169 U.S. App. D.C. 166, 515 F.2d 397, 402 (D.C. Cir. 1974) (finding jurisdiction to review an FCC order denying reconsideration of a notice of apparent liability, even though licensee had paid the proposed forfeiture upon receipt of the notice, so that no further administrative proceedings were necessary and no district court action filed).

In the absence of direct support, the FCC calls our attention to rulings in cases involving other statutes, with varying purposes and enforcement provisions. Because these cases generally recount the clear and convincing evidence of Congressional intent to exclude review, we are not persuaded that they are germane to the instant case. See, e.g., Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207-12, 127 L. Ed. 2d 29, 114 S. Ct. 771 (1994) (holding judicial review of a pre-enforcement ruling precluded by the Federal Mine Safety and Health Amendments Act of 1977 where the aggrieved mine owner could initiate an administrative challenge and the

legislative history demonstrates a recognition that prompt abatement of violations was essential to avoid "frequent and tragic mining disasters"); Solar Turbines Inc. v. Seif, 879 F.2d 1073, 1076-78 (3d Cir. 1989) (holding judicial review of a pre-enforcement ruling unavailable under the Clean Air Act because early intervention would interfere with statutorily-required efforts at negotiation and compromise); see also Laguna Gatuna, Inc. v. Browner, 58 F.3d 564, 566 (10th Cir. 1995) (holding that case law from other circuits "squarely precluded" jurisdiction over pre-enforcement ruling under the Clean Air Act).

We determine that nothing in the Communications Act itself bars our review, and therefore turn to the issue of whether the FCC order is ripe for judicial resolution.

B. RIPENESS

"The familiar two-part ripeness inquiry requires us to evaluate both the fitness of the issue for judicial resolution and the hardship to the parties of withholding judicial consideration. In applying this test, we must caution against a rigid or mechanical application of a flexible and often context-specific doctrine." Harvey E. Yates Co. v. Powell, 98 F.3d 1222, 1237 (10th Cir. 1996) (quotations and citations omitted).

The "fitness for judicial resolution" prong requires the court to consider "the legal nature of the question presented and the finality of the administrative action. . . ." Id. at 1237-38 (quotations omitted). Both of these factors favor the exercise of jurisdiction over RMR's claims. The challenge to the FCC order presents primarily a legal question: whether the FCC properly interpreted the term 'generate' as used in 47 C.F.R. §

15.3(0). See Hoover & Bracken Energies, Inc. v. United States Dep't of Interior, 723 F.2d 1488, 1489 (10th Cir. 1983) (stating that agency interpretation of statutes and regulations is a question of law).

Moreover, the FCC's action was final, in that it was "formalized and its effects felt in a concrete way" by RMR. Abbott Labs., 387 U.S. at 148. The order was promulgated by the full Commission and announced in a press release. Under the order, the marketing of RMR's product was permanently prohibited. We therefore conclude that RMR's challenge to the FCC order is "'fit for judicial resolution' under the first prong of the Abbott Labs. ripeness test." Harvey E. Yates Co., 98 F.3d at 1238.

In evaluating potential hardship under the second prong of Abbott Labs., we consider "'the possible harm to the parties of delaying judicial consideration.'" Id. (quoting Powder River Basin Resource Council v. Babbitt, 54 F.3d 1477, 1484 (10th Cir. 1995) (further citation omitted)). From the record, it is apparent that a delay of review would confront RMR with a Hobson's choice between obeying the order, and thus foreclosing review of the FCC determination, or "incurring the risks attendant upon noncompliance." Friends of Keeseville, Inc. v. Federal Energy Regulatory Comm'n, 859 F.2d 230, 236 (D.C. Cir. 1988). We therefore hold that RMR's appeal is ripe for review.

III. DISCUSSION OF THE MERITS

The FCC, the agency charged with executing the Congressional policy of maintaining control over all channels of radio transmission, see 47 U.S.C. §§ 151, 301, has the authority to promulgate regulations "governing the

interference potential of devices which in their operation are capable of emitting radio frequency energy . . . in sufficient degree to cause harmful interference to radio communications." 47 U.S.C. § 302a(a). In our review of the FCC's determination that its regulations prohibit the marketing of the Spirit II, we must give substantial deference to [its] interpretation of its own regulations. Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. In other words, we must defer to the [agency's] interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of . . . intent at the time of the regulation's promulgation. This broad deference is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program . . . .

Thomas Jefferson Univ. v. Shalala, 512 [*16] U.S. 504, 512, 129 L. Ed. 2d 405, 114 S. Ct. 2381 (1994) (quotations and citations omitted). See also Santa Fe Energy Prod. Co. v. McCutcheon, 90 F.3d 409, 413 (10th Cir. 1996). When an agency applies its "regulation to complex or changing circumstances," the Court has explained, this "calls upon the agency's unique expertise and policymaking prerogatives" and courts must "presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991).

RMR's argument on appeal directly challenges the FCC's interpretation of its regulations. Its syllogism is: (1) the regulations apply only to devices that "generate" radio

frequency energy, see 47 C.F.R. § 15.3(n) (defining incidental radiator); § 15.3(o) (defining intentional radiator); § 15.3(z) (defining unintentional radiator); (2) the Spirit II reflects the signal from a radar gun, and does not "generate" radio frequency energy as that term is commonly understood; and, therefore, (3) the Spirit II is not subject to the FCC equipment authorization requirements for intentional radiators, see 47 C.F.R. § 15.201(b), or ban on intentional, unintentional, or incidental radiators that cause harmful interference to another source of radio frequencies, see 47 C.F.R. § 15.5(b). According to RMR's view, the FCC's basic error was in determining that the Spirit II's reflection and modification of a radar signal amounted to the generation of radio frequency energy.

In analyzing this contention, we begin with the plain language of the regulations. The FCC's decision to give "generate" a more expansive treatment than that advocated by RMR is consistent with the ordinary meaning of the term as in "create," "produce," or "propagate." Webster's Third New International Dictionary at 945; see also id. at 1817 (defining "propagate" as "to cause to continue"). Moreover, a broad reading of the word furthers a stated aim of the Communications Act, which is to "govern[] the interference potential of devices which in their operation are capable of emitting radio frequency energy." 47 U.S.C. § 302(a); see also id. at § 333 (prohibiting willful or malicious interference with licensed or authorized radio communications). It can also be reconciled with the purpose of the regulations, which is to regulate and minimize interference between users of the electromagnetic spectrum.

We conclude, therefore, that the FCC's interpretation of the term "generate" is neither "'plainly erroneous nor inconsistent

with the regulation.'" Thomas Jefferson Univ., 512 U.S. at 512 (quoting Udall v. Tallman, 380 U.S. 1, 17, 13 L. Ed. 2d 616, 85 S. Ct. 792 (1965)). The order of the FCC, released December 10, 1997, is AFFIRMED. The FCC's motion to dismiss is DENIED.

----------Footnotes----------

n1 Radar is a radio device or system for locating an object by means of emitting radio signals usually in the form of pulses of an ultrahigh frequency and observing and analyzing the minute signals reflected from the object and received at or near the point of transmission in such a way that range, bearing, and other characteristics of the object may be determined.

Webster's Third New International Dictionary at 1871 (1993). See also 47 C.F.R. § 2.1(c) (defining radar as a "radiodetermination system based on the comparison of reference signals with radio signals reflected, or retrainsmitted [sic], from the position to be determined").

n2 FCC rules define radio frequency (RF) energy as "electromagnetic energy at any frequency in the radio spectrum between 9 kHz and 3,000,000 MHZ." 47 C.F.R. § 15.3(u).

n3 FCC rules define an intentional radiator as "[a] device that intentionally generates and emits radio frequency energy by radiation or induction." 47 C.F.R. § 15.3(o).

n4 Except for exempted devices not involved in this matter, "all intentional radiators operating . . . shall be certificated by the Commission . . . prior to marketing." 47 C.F.R. § 15.201(b).

n5 § 15.5(b) provides, in pertinent part, that " operation of an intentional, unintentional, or incidental radiator is subject to the condition[] that no harmful interference is caused. . . ."

n6 Section 402(a) provides: "Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter [except in inapplicable situations] shall be brought as provided by and in the manner prescribed in" the Administrative Orders Review Act, see 28 U.S.C. §§ 2341-49, which governs judicial review of rules, regulations, and final orders of several agencies. Section 2342 of that act vests the courts of appeals with jurisdiction to review a final agency order.

n7 In forfeiture proceedings, the FCC first issues "a citation of the violation charged" and provides "a reasonable opportunity for a personal interview with an official of the Commission." 47 U.S.C. § 503(b)(5); 47 C.F.R. § 1.80(d). The RMR administrative process terminated at this point because RMR stopped marketing the Spirit II.

If an alleged violator subsequently engages in the prohibited conduct, however, the FCC may proceed to impose a monetary forfeiture, under either of two separate tracks, each with its own set of procedures and provisions for judicial review. In the more commonly-used track, the FCC issues a notice of apparent liability. See 47 U.S.C. § 503(b)(4); 47 C.F.R. § 1.80(f). The suspected violator may either pay the penalty or respond in writing to show why a lesser penalty, or

none at all, should be imposed. See 47 C.F.R. § 1.80(f)(3). Upon consideration of the record, the FCC "will issue an order canceling or reducing the proposed forfeiture or requiring that it be paid in full." 47 C.F.R. § 1.80(f)(4). To enforce the order, the FCC is to bring a collection action in the district court for trial de novo. See 47 U.S.C. § 504(a). Under the alternative hearing approach, the FCC may impose a penalty after notice and a full evidentiary hearing. See 47 U.S.C. § 503(b)(3(A); 47 C.F.R. § 1.80(g). Forfeitures assessed through this procedure are reviewable in the court of appeals. See 47 U.S.C. § 402(a). To collect after judicial review or lapse of time for such review, the FCC may bring a lawsuit in the district court, in which action "the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review." 47 U.S.C. § 503(b)(3)(B).

Federal Communications Commission
ECC 97-404

Before the
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)
	)
Rocky Mountain Radar	)
Application for Review, and	)
Request for Expedited Action	)
and Emergency Petition for	)
Stay of Official Citations	)

MEMORANDUM OPINION AND ORDER
Adopted: December 4, 1997
Released: December 10, 1997

By the Commission

I. INTRODUCTION

I. In this Memorandum Opinion and Order we address an Application for Review and Request for Expedited Action filed pursuant to 47 C.F.R. 1.115, and an Emergency Petition for Stay of Official Citations filed by Rocky Mountain Radar. By these documents, Rocky Mountain Radar seeks review and stay of the citations issued by the Compliance and Information Bureau (CIB) informing Rocky

Mountain Radar that the marketing of the Spirit II radar jammer device was in violation of Commission rules and that continued marketing could subject Rocky Mountain Radar to monetary forfeitures. For the reasons noted below, we deny the Application for Review and the Petition for Stay.

II. BACKGROUND

2. On February 12, 1997, the Director, Investigations Group, CIB, issued an official citation[1] to Rocky Mountain Radar advising it that the manufacture and marketing of the Rocky Mountain Spirit II radar jammer violated provisions of the Communications Act of 1934, as amended (the Act). 47 U.S.C. 302,[2] relating to the manufacturing and marketing of devices that interfere with radio transmissions and the commission's equipment authorization provisions of Section 2.803 of the commission's Rules, 47 C.F.R. § 2.803.

3. In its February 24, 1997, response to the initial citation, Rocky Mountain Radar contended that its device was not an intentional radiator and thus was not covered by the Commission's authorization rules. It noted that Section 15.3(u) of the rules, 47 C.F.R. § 15.3(u). defines "radio frequency energy (RF) as electromagnetic energy at any frequency in the radio spectrum between 9 kHz and 3,000,000 MHz, and contended that its device fell outside these frequencies. Rocky Mountain Radar further argued that the device is exempt from the equipment authorization process because it falls within the exemption allowed under Section 15.103(a). 47 C.F.R. § 15.103(a), for digital devices that are unintentional radiators used exclusively in any transportation vehicle including motor vehicle and aircraft.

4. Both the Office of Engineering and Technology (OET) and CIB reviewed the documentation and response

submitted by Rocky Mountain Radar and, by letter dated July 22, 1997. OET and CIB rejected the arguments made by Rocky Mountain Radar. On the same date, CIB advised Damark International Inc. (Damark) a distributor of the Spirit II, that the device was not authorized and should not be marketed. The OET and CIB examined a report of testing performed on the device by Rocky Mountain Radar's consultant. The report did not rebut CIB's initial determination that the Spirit II radar jammer device is designed to receive, modulate and emit a modulated signal at microwave frequencies. After reviewing the documentation; CIB and OET determined that the device emitted RF energy on frequencies between 9 kHz and 3,000,000 MHz, and was not an exempt device under Section 15.103(a) of the rules, 47 C.F.R. § 15.103(a), but instead, constituted an "intentional radiator" under Section 15.3(o). See 47 C.F.R.. § 15.3(o). For this reason, CIB and OET concluded that the device did not qualify for the exemption from the authorization requirements in Section 15.103(a). CIB and OET also concluded that, inasmuch as the intended purpose of the device is to interfere with licensed police communications, it could not be certified and its continued sale is a violation of Sections 15.201(b). See 47 C.F.R. § 15.201(b). CIB, therefore, warned Rocky Mountain Radar that continued marketing of the Spirit II radar scrambler device would be in violation of Commission rules.

5. On August 15, 1997, Rocky Mountain Radar filed the instant Emergency Petition for Stay of Official Citations (Petition). On August 18, 1997, Rocky Mountain filed an Application for Review and Request for Expedited Action (Application) by the Qommission of the citations issued by the Bureau. In its Petition, Rocky Mountain Radar requests a stay based upon its argument that (1) the FCC has

no jurisdiction over the device because "it does not and physically cannot generate or emit radio frequency energy." and thus, the Bureau's characterization of the device as an "intentional radiator" is based on a misstatement of fact. (2) Rocky Mountain Radar will sustain irreparable financial injury if it is not allowed to market this device: (3) it is up to each state, rather than the Commission, to determine whether the Spirit II device presents a danger or harm to the public or public safety agencies and prohibit the sales of the device in their states; and (4) that a Stay would be in the public interest because the public has an interest in limiting governmental conduct to the existing rules and laws. In its Application, Rocky Mountain Radar essentially raises the same arguments. Rocky Mountain Radar also requests a Stay of Cm's Official Citations to Damark.

III. DISCUSSION

6. We first address Rocky Mountain Radar's argument that thc FCC has no jurisdiction because the device at issue does not and cannot generate or emit radio frequency energy. Section 153(o) of the rules, 47 C.F.R. § 15.3(o), defines an intentional radiator as a device that intentionally generates and emits radio frequency energy by radiation or induction. Section 15.3(u) of the rules, 47 C.F.R. I 15.3(u), in turn, defines radio frequency energy as electromagnetic energy at any frequency in the radio spectrum between 9 kHz and 3,000,000 MHz. Rocky Mountain Radar contends that "[t]here is no current FCC rule that permits the Commission to prohibit the marketing or sale of a device that does not generate nd emit RF energy." (emphasis in original). In particular, Rocky Mountain Radar maintains that Section 15.3(o) of the rules requires both the generation and emission of RF energy for a device to fall within the definition of an

"intentional radiator." In support of its argument, Rocky Mountain Radar submits the results of measurements performed by a consultant showing that the Spirit II does not generate or emit any radio frequencies.

7. The Commission's authority under Section 302(a) of the Act, 47 U.S.C. § 302(a). extends to "devices which in their operation are capable of emitting radio frequency energy by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications." In this regard, we observe that the Rocky Mountain Radar Spirit II device is designed to function only when it is illuminated by a police radar signal. The Spirit II device uses the radar signal as a source of RF energy, modulates the signal electronically to generate a different RF signal, and emits that RF signal to cause interference to police radars. Thus, we disagree with Rocky Mountain Radar's assertion that the device does not generate and emit RF energy. The fact that the original source of the radio frequency energy is external to the device does not place the Spirit II beyond the Commission's jurisdiction. When the device is in operation, it uses a source of RF energy to itself generate a new RF signal and emit this signal into space to cause interference. Rocky Mountain Radar provided tests conducted by one consulting finn while the device was not subject to any RF input signal as it would be when operating near a police radar. The opinion offered by this consulting firm regarding the emissions characteristics of the device when it was not subject to normal or intended operation is therefore not dispositive of the issue whether the device is covered by the Commission's authorization ruless.[3] Further, contrary to Rocky Mountain Radar's assertions that its device contained no RF circuitry whatsoever, its consultant, Hugh V.H. Bishop, states that "[t]here are no RF devices in the

Spirit II other than a mixer diode inside a wave guide cavity with ridged antenna and matching screw." Mr. Bishop goes on to conclude that "since the mixer is not on it's (sic) own an active device for the mixer to have any purpose there must be incident radiation at microwave frequencies." Mr. Bishop's conclusions are therefore contrary to Rocky Mountain Radar's assertion that the device contains no RF circuitry for the generation and emission of radio frequency energy. In light of the foregoing discussion, we conclude that the Spirit II, and any other similar device, meet the definition of an intentional radiator contained in Section 15.3(o) of the rules and therefore we hold that marketing of the Spirit II and any other similar device without FCC equipment authorization is in violation of Sections 15.201(a) and 2.803 of the Commission's Rules. See 47 C.F.R. §§ 15.201(a), 2.803.

8. We also reject Rocky Mountain Radar's argument that its device qualifies as exempt from equipment authorization under Section 15.103(a). We find that this exemption is not applicable in this case. The exemption applies only to digital devices utilized exclusively in any transportation vehicle including motor vehicles and aircraft. Section 15.3(k) defines a digital device, in relevant part, as an unintentional radiator (device or system) that generates and uses timing signals or pulse rates at a rate in excess of 9.000 pulses (cycles) per second and uses digital techniques. 47 C.F.R. § 15.3(k). The Spirit II is not an unintentional radiator and does not generate pulse rates in excess of 9,000 pulses per second, Further, Rocky Mountain Radar has not demonstrated that its device would be used exclusively in transportation vehicles. Accordingly, we reject Rocky Mountain Radar's argument that the Spirit II is exempt from equipment authorization pursuant to Section 15.103(a).

9. We also observe that irrespective of the definitional issues addressed above, Section 15.5 of the Commission's Rules, 47 C.F.R. § 15.5, expressly states that operation of an intentional, unintentional, or incidental radiator is subject to the condition that it may not cause harmful interference. The Spirit II device directly conflicts with this requirement because it interferes with police radars which are devices properly authorized by the Commission. In this connection, we have specifically alerted the public that the intentional use of radar januners is considered "malicious interference" and is strictly prohibited by the Section 333 of the Act. 47 U.S.C. § 333.[4]

10. We find that it would be contrary to the public interest to permit continued marketing of a device that is designed to deliberately cause radio frequency interference to authorized radio services in violation of the Communications Act and our rules. Rocky Mountain Radar has offered no persuasive reason why we should refrain from enforcing our rules, therefore, we reject Rocky Mountain Radar's Petition for Stay of Official Citations.

IV. ORDERING CLAUSES

11. ACCORDINGLY, IT IS ORDERED, that pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154 (i) and 47 C.F.R. §1.115, and 47 C.F.R. § 141, et. seq. the Application for Review and Emergency Petition for a Stay of Official Citations filed by Rocky Mountain Radar are DENIED.

12. IT IS FURTHER ORDERED that Rocky Mountain Radar's petition to stay the Official Citation issued to Damark International. Inc. IS DENIED.

13. IT IS FURTHER ORDERED that a copy of copy of this Order shall be sent by certified mail, return-receipt requested, to Rocky Mountain Radar and counsel.

FEDERAL
COMMUNICATIONS
COMMISSION

Magalie Roman Salas
Secretary

Footnotes

[1] The citation was issued pursuant to 47 U.S.C. § 503(b)(5).

[2] Section 302 of the Act authorizes the Commission to make reasonable regulations governing the interference potential of devices "which in their operation are capable of emitting radio frequency by radiation, conduction, or other means in sufficient degree to cause harmful interference to radio communications." 47 U.S.C. §302(a)

[3] Under the Commission's rules governing testing procedures for emissions measurements of conducted and radiated emissions shall be performed with all radiating sources emitting. See 47 CF.R. § 1551.

[4] See FCC Public Notice entitled "FCC Regulates Radar Transmitters. But Not Radar Detectors", 11 FCC Red 17268 (1996). Section 333 of the Act. 47 U.S.C. § 333. states that no person shall willfully or maliciously interfere with or

cause interference to any radio communications of any station licensed or authorized by or under the Act.